No. 22,104-A

IN THE

United States Court of Appeals

For the Ninth Circuit

JOHN BECKER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of California, Northern Division

APPELLANT'S OPENING BRIEF

MORGAN & MOSCONE,
343 Sansome Street, Tenth Floor,
San Francisco, California 94104,
Attorneys for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

VI

VII

Table of Authorities Cited

Cases

Constitutions

Statutes

No. 22,104-A

IN THE

United States Court of Appeals

For the Ninth Circuit

JOHN BECKER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of California, Northern Division

APPELLANT'S OPENING BRIEF

JURISDICTION

Appellant was indicted on August 5, 1966, by the Federal Grand Jury, United States Court for the Northern District of California, Criminal No. 14748, for the violation of 18 USC 371, 26 USC 5205 (a) and 26 USC 5604 (a) (1) and was tried before the Honorable Thomas J. McBride and a jury, commencing February 28, 1967. (CT 2; RT 3.) Appellant was convicted on all three counts and sentence was pronounced on May 12, 1967. Appellant filed a timely notice of appeal on May 19, 1967.

The District Court assumed jurisdiction under the provision of Title 18 USC 3231. This Court has juris-

diction to review this judgment under Title 28, USC 1291.

STATEMENT OF THE CASE

The appellant, Mike A. Thomas, in his Opening Brief in Action No. 22,104-B has made a fair and rather complete statement of the case and therefore it would be merely repetitious to go through the same facts in this brief and accordingly this appellant adopts and incorporates by reference herein the statement of the case by appellant, Mike A. Thomas, and will allude to appropriate facts of the case in his argument as is necessary.

ISSUES

The appellant raises seven issues in this appeal which are as follows:

1. *Venue*—The appellant was entitled to be tried in the United States District Court for the Northern District of California, Northern Division, and it was error to require that he be tried in the Eastern District.

2. *Violation of Constitutional Guarantee*—The statements of the appellant admitted into evidence were admitted over the objection of the appellant and in violation of the constitutional guarantees enumerated in *Escobedo* and *Miranda.*

3. *Illegally Obtained Evidence*—The introduction into evidence of tape recordings of the appellant was prejudicial error.

4. *Entrapment*—The appellant was entrapped as a matter of law.

5. *Consent*—The Government, in fact, consented to the conduct of the appellant.

6. *Evidence of Other Crimes*—The introduction of evidence purporting to establish other crimes or misconduct was prejudicial error.

7. *Violation of Privilege Against Self-Incrimination*—The law under which appellant was charged requires self-incrimination and there was no effective waiver of the privilege against self-incrimination by the appellant.

ARGUMENT

I

VENUE

Appellant Was Entitled to Be Tried in the U.S. District Court for the Northern District of California, Northern Division, and It Was Error to Require That He Be Tried in the Eastern District

The indictment in this matter was filed in the United States District Court for the *Northern District of California, Northern Division.* (Clerk's Transcript (hereinafter referred to as C.T.) p. 1.) The appellant, pursuant to said indictment, was arraigned and pleaded not guilty to the charges of the indictment. The indictment was dated August 5, 1966. On September 18, 1966, pursuant to Public Law 89-372 80 Statute 75, the State of California was divided into four Judicial Districts to be known as the Northern, Eastern, Central and Southern District of Cali-

fornia. Included in the Eastern District is the County of Sacramento. Pursuant to the same Public Law, Court for the Northern District was to be held at Eureka, Oakland, San Francisco and San Jose but not Sacramento County. The appellant objected to the place of trial being set for the Court House of the Eastern Judicial District in Sacramento, California, contending the case should be tried in a court in the Northern District. Over his objection, the trial was set for Sacramento and the appellant thereafter filed a petition for leave to file petition for Writ of Mandamus and Prohibition. The petition was summarily denied. It is, nevertheless, the contention of the appellant that having been indicted in the *Northern District of California,* Northern Division, that he was entitled to be tried in a court in the *Northern District.*

> "Whenever any new district or division is established or *any county* or territory *is transferred from one district or division to another district* or division, prosecution for offenses committed within such district, division, county or territory prior to such transfer shall be commenced and *proceeded with the same as if such new district or division had not been* created, or *such county or territory had not been transferred, unless* the court, upon the application of the defendant, *shall order the case to be removed to the new district,* or division for trial." 18 USCA 3240. (Emphasis added.)

> ". . . The trial court was clearly right in refusing to order a transfer beyond its power and authority to grant, and its jurisdiction to proceed with the trial in *the district in which the crime was committed, the same as if the new district had*

not been created, is plain. . . ." *Hale v. United States,* 25 Fed. 2d 430 (8th Cir. 1928). (Emphasis added.)

"The question seems hardly open for further discussion since the opinion of the Supreme Court in *Lewis v. United States,* 279 US 63, 49 S. Ct. 57, 73 L. Ed. 615.

"We can see no difference in the controlling facts in that case and those in this. There, by Act of Congress, that part of the territory (Tulsa County) in which the crime was committed and other counties were taken from the district of which they were then a part and put into a new district, and after that defendants were indicted in the old district. The objection was held to be without merit. . . . That section means, according to its plain terms, that the prosecution of all crimes and offenses committed within the territorial limits of the old Southern District shall be commenced and proceeded with the same as if the place in which they were committed had not, after the commission thereof, been detached from the territorial limits of said district. That seems plain and was so held in the *Lewis* case, supra, . . ." *Mizell v. Vickrey,* 36 Fed. 2d 327, 329 (10th Cir. 1929).

It is the appellant's contention that both the cases and the Code Section clearly hold that the fact that Sacramento had been removed from the Northern District did not authorize the trial in the new Eastern District, to wit, Sacramento. The appellant was indicted in the Northern District and therefore should have been tried in the same district—the refusal of this right was error.

II

VIOLATION OF CONSTITUTIONAL GUARANTEES

The Statements of the Appellant Admitted Into Evidence Were Admitted Over the Objection of Appellant and in Violation of the Constitutional Guarantees Enumerated in Escobedo and Miranda

The Agent, Courtney, met appellant in September, 1962. (Reporter's Transcript (hereinafter referred to as R.T.) p. 664, lines 16-20.) In October, 1962, appellant was arrested and after a plea of guilty was sentenced to jail and placed on probation. The 1962 charge dealt with violations of similar type laws to those involved in the case at bar. When appellant was released on probation, the Agent, Courtney, continued his pursuit of the appellant until appellant was arrested again in August of 1966, in the present matter. Concededly, at no time after being placed on probation up until his arrest in August of 1966, was appellant ever advised of his constitutional rights to remain silent, and to have counsel as spelled out in *Miranda v. Arizona,* 384 US 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 and *Escobedo v. Illinois,* 378 US 478, 2 L. Ed. 2d 977, 84 S. Ct. 1758. (R.T. 370, lines 22-26; R.T. 371, lines 1-21; R.T. 895, lines 9-11.) The transcript contains volumes of statements made by appellant to the Government agents and testified to by the agents. The basic question in this regard is whether there was any obligation on the part of the Government or its agents to so advise appellant of his constitutional rights. The appellant contends that there was such an obligation and relies on two different principles in support thereof. First, appellant contends that he was, in fact,

in custody at all times during the period he was on probation and this type of custody is not made an exemption or exclusion by *Miranda* or *Escobedo* and therefore the right to be advised existed.

> "By custodial interrogation we mean questioning initiated by law enforcement officers after a person has been taken into custody or *otherwise deprived of his freedom of action in any significant way.*" *Miranda v. Arizona, supra,* page 706 (16 L. Ed. 2d). (Emphasis added.)

A person on probation is one that is "deprived of his freedom of action in any significant way".

> ". . . While on probation, the prisoner continues to be, in a sense, in custodia legis, . . ."
>
> *Peder v. Fleming,* 153 Fed. 2d 800 (D.C. 1946).

The rules of *Miranda* and *Escobedo* do not exclude this situation and therefore appellant was entitled to this advice and failure to give it constitutes error.

Secondly, the investigation was no longer a general inquiry into an unsolved crime but had begun to focus on a particular suspect, to wit, the appellant. *Escobedo* established that in this situation, the appellant was entitled to be advised of his rights which, of course, he was not. This also was error.

III

ILLEGALLY OBTAINED EVIDENCE

The Introduction Into Evidence of the Tape Recordings of the Appellant Was Prejudicial Error

There were numerous tape recordings of conversations between appellant and the agent that were introduced into evidence and played to the jury. (Ex. B, V-1, V-2.) The introduction into evidence and the playing thereof were objected to by appellant on the basis that no proper legal authority had been granted to the Government to engage in this type of conduct. (R.T. 679, 680.) It must be conceded that there was no legal authorization granted for the use of the recording devices on the appellant—there was no "Antecedent justification before a magistrate" as referred to in *Osborne v. United States,* 385 US 323, 17 L. Ed. 2d 394, 400, 87 S. Ct. 429.

It is the contention of the appellant (as it was at the trial also) that in a case such as the present one, under the principles of the *Osborne* case, it was incumbent upon the Government to acquire judicial authority before it set about to "bug" individuals. The Justices in the *Osborne* case clearly enunciated their fears of the indiscriminate use of the modern electronic devices and ultimately came to the conclusion in that case:

> "There could hardly be a clearer example of 'the procedure of antecedent justification before a magistrate that is central to the Fourth Amendment' *as 'a precondition of lawful electronic* surveillance.'". (Emphasis added.)

The death knell to this type of indiscriminate "bugging" was finally sounded in *Berger v. New York,* 18 L. Ed. 2d 1040, where the Court struck down a New York statute authorizing electronic eavesdropping. What had previously been a vocal minority on the issue of electronic eavesdropping or "bugging" and judicial regulation thereof, now became the majority and held that electronic eavesdropping or bugging is a form of search and seizure that must be exercised under the standards set by the Fourth Amendment. There is also a question whether indiscriminate use of such devices raises grave constitutional questions under the Fifth Amendment. The Court then analyzed the procedure followed in *Osborne v. United States,* 385 US 323, 17 L. Ed. 2d 394, 87 S. Ct. 429 and stated at page 1051 of 18 L. Ed. 2d:

> ". . . Through these strict precautions the danger of an unlawful search and seizure was minimized."

Clearly, in the present case, there was no precautions, there was only "indiscriminate" eavesdropping and bugging, the very things that the now majority of the Supreme Court has been criticizing, since *On Lee v. United States,* 343 US 747, 96 L. Ed. 1270, 72 S. Ct. 967.

Appellant, therefore respectfully argues that the "bugging" accomplished in the present case did not comply with the safeguards established judicially and constitutionally and to admit the same in evidence, over appellant's objection was error.

It has also been brought to appellant's attention, within the last month, that there was additional "electronic eavesdropping" that was not made known to Court and counsel wherein the appellant's conversations with his co-defendant were recorded. There can be no dispute that such is illegal and any fruit borne thereby must be similarly tainted. This, of course, cannot be determined without a full disclosure of the contents of the tapes.

IV

ENTRAPMENT

The Appellant Was Entrapped As a Matter of Law

This case probably reaches the heights to which a Government agent will go to acquire a conviction. Perseverance, in and of itself can be a virtue, but where, as here, the perseverance was utilized to get the appellant to *commit* a crime, then the halo disappears and it clearly becomes a vice. That Agent Courtney did everything within his power to have the appellant commit a crime is without dispute. Without lingering too long on the specific facts, it suffices to say that he:

1. Posed as a big time gangster—a member of the syndicate (R.T. 831, lines 16-24); "Mr. Big" of a big syndicate (R.T. 852, lines 12-17);

2. Represented that his organization dealt severely with those who would disobey its orders, desires or mandates (R.T. 897, lines 24-26; R.T. 898, lines 1-2);

3. Represented that he was in trouble with his superior because appellant and co-defendants

were not producing or delivering (R.T. 893, lines 8-18; R.T. 905, lines 14-22);

4. Offered assistance by way of money, equipment for a still, sugar, a still site, or personnel (a still jockey) (R.T. 906, lines 3-14; R.T. 908, lines 10-17; R.T. 911, lines 3-7; R.T. 933, lines 10-12; R.T. 935, lines 21-26; R.T. 936, lines 1-8).

Despite all of this, and with all of this, it took the Agent 2½ years to get the appellant to allegedly commit a crime and then only with the Agent and because of the Agent.

Appellant respectfully contends that this type of conduct on the part of a law enforcement officer has not and will not be tolerated. There is no way to even effectively gauge the quantum of fear a man may have when one morning he awakens and believes he is married to a criminal syndicate. The Government should not be allowed to engage in this sort of a masquerade.

". . . And while it may be true that the mere aiding of one in the commission of a criminal act by a government officer or agent does not preclude the conviction of the party committing the crime, yet where the officers of the law have *incited* the party to commit the crime charged and *lured* him on to its consummation, the law will not authorize a verdict of guilty." *Sam Yick v. United States,* 240 Fed. 60. (Emphasis added.)

"So one desiring to test a supposed liquor seller might represent himself to be such a person as can be trusted in such a transaction and do and say such things as would not be unusual in such dealings but he could not pretend sickness or *put*

> *extraordinary pressure upon his victim to get him to break the law* and of course *could not organize a liquor plot and then prosecute for it." United States v. Wray,* 8 Fed. 2d 429. (Emphasis added.)

Any quarrel with the statement that Agent Courtney incited, lured, put extraordinary pressure upon his victim and organized a liquor plot, would be to disregard completely and arbitrarily all of the evidence from the prosecution, as well as the defense, and *all* inferences therefrom.

If this were not enough to nullify the convictions, there still is to be considered the fact that in this 2½ year caper of the Agent, he failed to uncover or disclose any "bootlegging" by the appellant as respects other people—neither past nor present—thus the only crimes were with the Agent and because of his prodding.

> "The case differs from those where a just suspicion of offense already attaches to the defendant so that the agent's activities but expose and facilitate the proof of independently existing criminal activity rather than as the court put it (*Scott v. United States,* 43 L. Ed. 471) 'Placing temptation before a man and endeavoring to make him commit a crime.' The great difference is that the agent's activities must serve to throw light on independently existing criminality and must not themselves be the constitutive elements of all of the offense that is made to appear. . . ." *United States v. Campbell,* 235 Fed. Sup. 190.

If this Honorable Court accepts the foregoing as a correct principle of law, need appellant say more?

V

CONSENT

The Government In Fact Consented to the Conduct of the Appellant

It is without dispute that the only alleged misconduct on the part of the appellant is that of allegedly possessing an unregistered still and selling unstamped distilled spirits and also entering into a conspiracy relating to the same. It is also without dispute that the still was constructed at the Government's urging (through Agent Courtney) and was used solely for the purpose of supplying distilled spirits to the Government and the Government was the sole purchaser thereof. (R.T. 885, lines 24-26; R.T. 886, lines 1-7; R.T. 886, line 26; R.T. 887, lines 1-10.) Under the principle enunciated in the case of *Henderson v. United States,* 261 Fed. 2d 909, the appellant was acting as an agent for the Government. The Agent Courtney referred to them as partners and as indicated previously the only sales made were those to the Government and the still was created and operated at the Government's request for the Government. Again, this conduct was not used to discover other criminal activity, but rather to create a crime that could be prosecuted. The Government, through its agents, was clearly a participant and therefore there can be no crime.

VI

EVIDENCE OF OTHER CRIMES

The Introduction of Evidence Purporting to Establish Other Crimes or Misconduct Was Prejudicial Error

Over the objection of appellant, evidence was admitted connecting appellant with $40,000.00 of allegedly stolen bonds. The Court recognized this evidence as being prejudicial to the appellant. (R.T. 2136-2146.)

Again, over the objection of appellant, evidence was admitted connecting appellant with stolen cigarettes and illegal gold. (R.T. 2168-2182.)

Significantly, all that was introduced were statements and correspondence relating to these items with no proof that any of these things in fact existed or that appellant was connected with them. (R.T. 2216, lines 10-11; R.T. 2222, lines 18-26; R.T. 2223, lines 1-2; R.T. 2240, lines 19-26; R.T. 2241, lines 1-10.) The prosecutor alluded to all this allegedly nefarious conduct in his argument. (R.T. 2629, 2630, 2631; R.T. 2648, 2649.)

The prosecution recognizing the questioned relevancy and admissibility of the evidence justified the same on the basis that when the appellant raised the issue of entrapment, the prosecution was free to go into all these collateral matters. (C.T. p. 41.) Also, the prosecutor in distinguishing *DeVore v. United States,* 368 Fed. 2d 396 (9th Cir. 1966) stated that *DeVore* did not involve an entrapment defense, thereby contending that the rule would be otherwise where entrapment is involved.

DeVore, of course, stated the general principle:

> ". . . It is also clear, however, that evidence which discloses the commission of another offense should be excluded, even though relevant, if the value of the evidence is limited and the danger of prejudice from its use is great . . ."

However, this Court clearly answered the prosecution in this regard when it recently stated:

> "Evidence of prior acts of misconduct is not admissible unless in some way relevant to the crime charged and where entrapment is in issue evidence of prior crime is not relevant unless it tends to prove that defendant was engaged in illegal operation in some way similar to those charged in the indictment. Proof that a man is a burglar or drunk does not tend to show that he has dealt in narcotics and was prepared to deal in narcotics at the time of the asserted entrapment . . ." *DeJong v. United States,* 381 Fed. 2d 725, 726 (9th Cir. 1967).

Applied to the present case:

1. Proof that a man is a burglar (stolen bonds) does not tend to show that he has dealt in illegal stills and contraband distilled spirits and was prepared to deal in them at the time of the entrapment.

2. Proof that a mean deals in "gold dust" does not tend to show that he has dealt in illegal stills and contraband distilled spirits and was prepared to deal in them at the time of the entrapment.

Certificate of Counsel

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Charles O. Morgan, Jr.,
Attorney for Appellant.